

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
the Joint Petition of Anthem, Inc.,)	
Blue Cross Blue Shield Association, WellCare)	CG Docket No. 02-278
HealthPlans, Inc., and the American Association)	
Of Healthcare Administrative Management)	
for the Expedited Declaratory Ruling and/or)	
Clarification of the 2015 TCPA Omnibus)	
Declaratory Ruling and Order)	
)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	

COMMENTS OF UNITED HEALTHCARE SERVICES, INC.

United Healthcare Services, Inc. (“United Health”),¹ through its counsel, respectfully submits these comments in response to the August 19, 2016 Public Notice released by the Federal Communications Commission (“FCC” or “Commission”) Consumer and Governmental Affairs Bureau (“Bureau”) in the above-captioned proceeding.² The Public Notice seeks comments on a Joint Petition by a number of parties in the healthcare ecosystem.³ The Joint

¹ Recognized as America’s most innovative healthcare company by Fortune magazine, United provides a diversified and comprehensive array of health and well-being products and services to more than 75 million individuals.

² See *Consumer and Governmental Affairs Bureau Seeks Comment on Expedited Declaratory Ruling Filed by Anthem, Inc., Blue Cross Blue Shield Association, Wellcare Health Plans, Inc., and the American Association of Healthcare Administrative Management*, CG Docket No. 02-278, Public Notice, DA 16-947 (rel. Aug. 19, 2016) (“Public Notice”).

³ Joint Petition of Anthem, Inc., Blue Cross Blue Shield Association, WellCare Health Plans, Inc., and the American Association of Healthcare Administrative Management for Expedited Declaratory Ruling and/or Clarification of the 2015 TCPA Omnibus Declaratory Ruling and Order, CG Docket No. 02-278 (filed July 28, 2015) (“Joint Petition”).

Petition seeks clarification that the “provision of a phone number to a ‘covered entity’ or ‘business associate’ (as those terms are defined under the [Health Insurance Portability and Accountability Act (“HIPAA”)]) constitutes prior express consent for non-telemarketing calls allowed under HIPAA for the purposes of treatment, payment, or health care operations.”⁴ The Joint Petition also seeks confirmation that “healthcare provider” as that term is used in the *2015 Omnibus Order* encompasses “HIPAA covered entities and business associates.”⁵

As discussed below, the Bureau should grant the proposed clarifications. They are consistent with the Commission’s prior healthcare-related TCPA decisions, which have turned not on the precise identity of the HIPAA-regulated speaker, but rather the nature of the beneficial HIPAA healthcare communication. They are also harmonious with HIPAA, which provides robust privacy protections for a wide range of healthcare communications regardless of the precise regulated party that makes the communication.

I. The Bureau Should Clarify that the Term “Health Care Provider” in Paragraphs 141 and 147 of the 2015 Declaratory Order Encompasses HIPAA-regulated “Covered Entities” and “Business Associates.”

In the *2015 Omnibus Order*,⁶ the Commission stated that the provision of a phone number to a “healthcare provider” constitutes “prior express consent” for certain “healthcare” calls and text messages subject to HIPAA.⁷ The Commission also exempted “healthcare providers” from the TCPA’s “prior express consent” requirement when placing certain free-to-

⁴ *Id.* at 4.

⁵ *Id.* at 3.

⁶ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, CG Docket No. 02- 278, WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd. 7961 (2015) (“*2015 Omnibus Order*”).

⁷ *Id.* ¶ 141.

end-user, healthcare-related calls and text messages. These exempted communications include, among others, appointment and examination notifications; wellness checkup reminders; hospital pre-registration instructions; pre-operative instructions; lab results; post-discharge follow-up intended to prevent readmission; prescription notifications; and home healthcare instructions.⁸

The Bureau should grant the Joint Petition and confirm that “healthcare provider,” as that term is used in the *2015 Omnibus Order*, encompasses all HIPAA covered entities and business associates. This would ensure that the *2015 Omnibus Order* is not erroneously read to limit the clarification and exemption solely to one category of HIPAA covered entities as the “consent gateway” for beneficial healthcare calls.

Non-telemarketing, healthcare-related calls improve health outcomes, and the *2015 Omnibus Order*’s healthcare clarification (and exemption) should turn on a call’s HIPAA-related purpose rather than whether it is a specific kind of HIPAA covered entity that obtained the original consent from the consumer.⁹ The overwhelming weight of evidence on the record demonstrates that patients desire healthcare calls and that such calls overwhelmingly benefit patients—regardless of which HIPAA covered entity or business associate places the calls.¹⁰ As the Joint Petition persuasively documents, “empirical studies demonstrate that health care-related texts and calls lead to more engaged patients, better patient outcomes, and lower health care costs for consumers.”¹¹ For example, voice and text messages to wireless telephones can be used

⁸ *Id.* ¶ 147.

⁹ *Id.* ¶ 146.

¹⁰ *See, e.g.*, Joint Petition (collecting evidence); Comments of United Healthcare Services, Inc., CG Docket No. 02-278 (Sep. 30, 2010) (same).

¹¹ Joint Petition at 5.

to improve adherence with controlling blood pressure in patients with hypertension, and for prompting women to participate in follow-up treatments after irregular pap smears.¹²

Federal agencies and national health policy experts have embraced these types of communications from covered entities and business associates. The Commission, for instance, has noted that consumers welcome, expect, and rely on such calls.¹³ In 2008, the Federal Trade Commission (“FTC”) adopted a HIPAA exemption from the Telemarketing Sales Rule (“TSR”) prerecorded telemarketing call rules, noting that prerecorded healthcare-related calls “generat[e] demonstrable improvements in patient outcomes” and that “consumers are willing to receive [such calls].”¹⁴ In its *2012 Robocall Order*, the Commission adopted the FTC’s reasoning with respect to certain healthcare calls and provided exemptions from some of its TCPA rules.¹⁵

Granting the Joint Petition is also consistent with HIPAA, which “set standards under which the healthcare sector could share and use health information and communicate with patients.”¹⁶ As the Joint Petition makes clear, the provision of healthcare typically involves multiple interactions with more than one provider.¹⁷ HIPAA reflects Congress’ appreciation that despite the complexity of the healthcare sector, consumers should reasonably expect uniform standards governing the communication and privacy of health information. The Commission

¹² See, e.g., Comments of America’s Health Insurance Plans, CG Docket No. 02-278, at 4 (filed Mar. 10, 2014).

¹³ See *2015 Omnibus Order* ¶¶ 145-46.

¹⁴ *Telemarketing Sales Rule*, Final Rule Amendments, 73 Fed. Reg. 51171, 51176, 51191 (2008) (“*2008 TSR Amendments*”).

¹⁵ *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, Report and Order, 27 FCC Rcd 1830 ¶¶ 57-65 (2012) (“*2012 Robocall Order*”).

¹⁶ *2008 TSR Amendments*, 73 Fed. Reg. at 51164-01.

¹⁷ Joint Petition at 19.

itself recognized that HIPAA “strives to improve portability and continuity of health insurance coverage in the group and individual markets, to combat waste, fraud, and abuse in health insurance and health care delivery, to promote the use of medical savings accounts, to improve access to long-term care services and coverage, and to simplify the administration of health insurance, among other purposes.”¹⁸ Given the law’s broad reach, it makes sense for the Commission to treat communications from HIPAA-regulated entities in a consistent manner, as HIPAA itself does.

Granting the Joint Petition and confirming that the clarification and exemption apply to the provision of a telephone number to HIPAA-regulated “covered entities” and “business associates” is also consistent with the *2012 Robocall Order* referenced above.¹⁹ Like the non-telemarketing, healthcare-related calls already exempted from certain TCPA requirements, the calls identified in the Joint Petition have been shown to help improve health outcomes regardless of which covered entity or business associate places the calls. Covered entities and business associates are routinely charged with placing calls widely recognized as socially beneficial—those, for instance, that help individuals quit smoking or manage diabetes.²⁰

Two additional factors support granting the requested relief. *First*, as the Joint Petition properly notes, serious constitutional concerns arise when an agency imposes arbitrary speaker-based distinctions on communications.²¹ The Supreme Court has repeatedly disfavored restrictions that target certain speakers unless they are at least reasonably tailored to accomplish

¹⁸ *2012 Robocall Order* ¶ 21.

¹⁹ *See 2015 Omnibus Order* ¶¶ 140-48; *2012 Robocall Order* ¶¶ 57-65.

²⁰ *See HHS OCR HIPAA Privacy, Uses and Disclosures for Treatment, Payment, and Health Care Operations*, Dec. 3, 2002, rev. Apr. 3, 2003 (“HHS Report”).

²¹ *See Joint Petition* at 23.

a substantial or compelling interest.²² No such interest exists here, and indeed the *2015 Omnibus Order* articulates none. *Second*, uncertainty regarding who is permitted to call under the *2015* clarification (and exemption) has materialized into costly litigation.²³ Even though courts have largely rejected such opportunistic claims,²⁴ the prospect of staggering class-wide liability has a potential chilling effect on legitimate pro-consumer healthcare outreach.

Accordingly, the scope of a consumer’s healthcare consent can—and should—reasonably cover communications from the HIPAA-regulated entities that have a role in the consumer’s healthcare: covered entities and business associates, as each is defined by HIPAA.

II. The Bureau Should Clarify that the Provision of a Phone Number to a “Covered Entity” or “Business Associate” Constitutes Prior Express Consent for Non-Telemarketing Calls Allowed under HIPAA for the Purposes of Treatment, Payment, and Health Care Operations.

The second clarification requested in the Joint Petition also flows from the *2015 Omnibus Order* and HIPAA. The Commission most recently stated that the scope of consent would depend on whether the call was “closely related to purpose for which the telephone number was

²² *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015) (rejecting local government’s defense that discrimination was permissible because it was based on the speaker’s identity instead of the content of the speech); *Citizens United v. FEC*, 558 U.S. 310, 340-41 (2010) (“Speech restrictions based on the identity of the speaker are all too often simply a means to control content. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker’s voice.”); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 795 (1978) (invalidating state statute that prohibited corporations and banking associations from communicating about most pending voter initiatives, noting that the statute “amounts to an impermissible legislative prohibition of speech based on the identity of the interests ...”).

²³ See, e.g., *Smith v. Blue Shield*, No. 8:16-cv-00108-CJC-KES (C.D. Cal.) (litigation against insurer that called consumer to provide plan notification after she had provided her telephone number to the insurer’s intermediary in an application).

²⁴ See Joint Petition at 17-18 & fn. 59 (collecting cases).

originally provided.”²⁵ As discussed below, consumers’ TCPA expectations when providing their telephone number to a covered entity or business associate follow their HIPAA expectations—they are consenting to non-marketing calls for treatment, payment, and health care operations.

HIPAA does not recognize any distinction between communications made for treatment purposes on one hand, and those made for operational purposes on the other. To the contrary, it defines the relevant actors in a regulated interaction to cover the operational aspects of that interaction. “Covered entity” and “business associate” are defined under HIPAA to encompass responsibilities relating to treatment, payment, and healthcare operations.²⁶ Moreover, HIPAA defines “health care operations” to include “activities related to the creation, renewal, or replacement of a contract of health insurance or health benefits.”²⁷ For instance, HIPAA provides that a “covered entity” may “use or disclose protected health information” for “treatment, payment, or health care operations, as permitted by and in compliance with § 164.506.”²⁸ Section 164.506 provides, in turn, that a “covered entity may use or disclose protected health information for its own treatment, payment or health care operations.”²⁹ Similarly, protected health information (“PHI”) is defined to include the treatment, payment, billing, and insurance aspects of health care.³⁰

²⁵ *2015 Omnibus Order* at fn. 474.

²⁶ 45 C.F.R. § 160.103 (protected health information); 45 C.F.R. § 160.103 (covered entity).

²⁷ 45 C.F.R. § 164.501

²⁸ *Id.* § 164.502(a)(1)(ii).

²⁹ *Id.* § 164.506(c)(1) (emphasis added).

³⁰ *Id.* § 160.103 (protected health information); 45 C.F.R. § 160.103 (covered entity).

Such operational communications are essential. For example, the Department of Health and Human Services similarly concluded that “[r]eady access to treatment and efficient payment for health care” both “require use and disclosure of protected health information,” which is “essential to the effective operation of a healthcare system” and “certain health care operations—such as administrative, financial, legal, and quality improvement activities—conducted by or for health care providers and health plans, are essential to support treatment and payment.”³¹ The FTC also concluded back in 2008 that prerecorded healthcare calls “generat[e] demonstrable improvements in patient outcomes” and play “an important cost-containment role in the provision of medical services.”³²

The FCC itself has also concluded that healthcare-related calls serve an important public interest purpose, “to ensure continued consumer access to healthcare-related information,” and that they do not “tread heavily upon the consumer privacy interests” that the TCPA was intended to protect.³³ This conclusion is supported by a number of studies that have shown that sending calls and text messages to wireless phones can be an effective strategy to improve consumers’ health, which is especially critical in light of significant barriers faced in the United States for the delivery of high-quality healthcare.

In addition, health plans are increasingly subject to legal requirements to improve healthcare outcomes and overall quality of service. Outreach to wireless telephone numbers provided by consumers is an important tool in meeting these requirements and improving the

³¹ HHS Report.

³² *2008 TSR Amendments*, 73 Fed. Reg. at 51191.

³³ See *2012 Robocall Order* ¶¶ 60, 63 (exempting healthcare-related calls to residential lines subject to HIPAA from consent, identification, time-of-day, opt-out, and abandoned call requirements otherwise applicable to prerecorded calls).

overall delivery of healthcare services while keeping costs to healthcare providers down. Consumers should not be prevented from receiving such messages because of frivolous class action lawsuits.

The FCC and the FTC have also both found that “HIPAA’s existing protections ... already safeguard consumer privacy.”³⁴ Telephone numbers are comprehensively regulated as PHI and subject to HIPAA’s stringent safeguards.³⁵ Given the Commission’s expressed reluctance against “unnecessarily restrict[ing] consumer access to information communicated through purely informational calls,”³⁶ along with HIPAA’s existing privacy safeguards, the Bureau should clarify that the provision of a telephone number to a covered entity or business associate demonstrates prior express consent under the TCPA for calls relating to treatment, payment, billing, and health care operations.

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For the foregoing reasons, the Bureau should grant the Joint Petition.

Respectfully submitted,

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³⁴ *2012 Robocall Order* ¶ 61.

³⁵ *See* Joint Petition at 12-15 & fn. 37.

³⁶ *2012 Robocall Order* ¶ 21.